No. 83-28

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN CINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 12-23) that the trial court's order permitting correction of a date in Count 1 of the indictment violated his Fifth Amendment right to be indicted by a grand jury. That contention is without merit.

1. Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted on one count of conspiring to reset and alter the odometers on motor vehicles, in violation of 18 U.S.C. 371 and 15 U.S.C. 1984 and 1990c (Count 1); one count of mail fraud, in violation of 18 U.S.C. 1341 and 2 (Count 4); and two counts of resetting and altering odometers of particular cars, in violation of 15 U.S.C. 1984 and 1990c(a) and (b) and 18 U.S.C. 2 (Counts 6 and 11).[1] Petitioner was sentenced to

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[1] Petitioner was acquitted on Counts 2, 3, 5, 7, 8, 9 and 10, which also involved charges of altering or resetting odometers and related mail fraud.

a one-year term of imprisonment on Count 1 and fines totaling $26,000 on the other three counts. The court of appeals affirmed petitioner's convictions on Counts 1, 6, and 11 and reversed his conviction on Count 4 (Pet. App. A1-A20).

The evidence at trial showed that petitioner participated in a scheme to purchase used cars and resell them after resetting their odometers. The first sentence of Count 1 of the indictment originally alleged that petitioner conspired to commit the offense described in the count between May 1977 and October 1979. However, the portion of Count 1 that listed overt acts (*e.g.*, purchase of vehicles and resetting of odometers) included acts expressly described as having taken place in 1975, 1976 and early 1977. A week before trial, petitioner moved to strike portions of Count 1 on the basis of this discrepancy in dates. On the first day of trial, the prosecutor explained to the trial court that the inconsistency was the result of a typographical error and moved to correct Count 1 to indicate that the conspiracy had begun in May 1975 (*i.e.*, to replace the digit "7" with the digit "5"). The transcript indicates that the trial court stated that allowing the proof to relate to 1975 was "more than in the nature of a variance under Rule 52A, and it is a substantive amendment of the indictment. So that it would be proscribed by the Bain case * * *" (Tr. 23-24). However, the court proceeded to deny petitioner's motion to strike and permitted the prosecutor to correct the date in Count 1. The court noted that several courts of appeals had permitted variances involving dates in an indictment; in addition, it observed that petitioner must have been aware of the discrepancy in dates in Count 1 for several months, but had failed to file his motion until one week before trial. Pet. App. A3, A5; Tr. 20-24.

2. Petitioner contends (Pet. 12-20) that the courts below ignored his constitutional right to be indicted by a grand jury in approving correction of the date in the initial sentence of Count 1. But an amendment to an indictment or a variance between what the indictment charges and what the proof shows at trial is permissible if it does not alter an essential or material element of the charge to the prejudice of the accused. See *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962); *Jervis* v. *Hall*, 622 F.2d 19, 22-23 (1st Cir. 1980); *United States* v. *Powell*, 564 F.2d 256, 259 (8th Cir. 1977), cert. denied, 435 U.S. 904 (1978). This Court has indicated that an indictment may be amended if the change is "merely a matter of form." *Russell* v. *United States*, 369 U.S. at 770. See also Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Correction of an obvious typographical error in an indictment does not violate any constitutional right of a defendant. See *United States* v. *Skelley*, 501 F.2d 447, 453 (7th Cir.), cert. denied, 419 U.S. 1051 (1974); *Stewart* v. *United States*, 395 F.2d 484, 487-489 (8th Cir. 1968).

Petitioner urges that since the trial court referred to a "substantive" amendment of the indictment, the correction of the date in Count 1 was a per se constitutional violation. But the courts below properly concluded that correction of the date did not affect any substantial right of petitioner. Despite the trial court's "somewhat imprecise" expression of its reasoning (see Pet. App. A5), it apparently accepted the government's explanation that the change entailed correction of a typographical error and did not implicate any fundamental constitutional right or cause any prejudice to petitioner. The court of appeals reviewed the change with considerable care and concluded that the starting date of the conspiracy was not an "essential element" of the alleged crime, because, inter alia, the conspiracy would have been

illegal no matter when it began. *Id.* at A8-A10. That approach is consistent with the decisions of other courts of appeals that have permitted clerical corrections of dates in indictments when the date is not a material element of the crime charged. See *United States* v. *Nicosia*, 638 F.2d 970, 976 (7th Cir. 1980), cert. denied, 452 U.S. 961 (1981); *Jervis* v. *Hall*, 622 F.2d at 22-23; *United States* v. *Powell*, 564 F.2d at 259; *Krana* v. *United States*, 546 F.2d 785, 786 (8th Cir. 1976) (date of crime changed from May 1975 to May 1976); *United States* v. *Akers*, 542 F.2d 770, 772 (9th Cir. 1976), cert. denied, 430 U.S. 908 (1977); *Stewart* v. *United States*, 395 F.2d at 487-489. See also *United States* v. *Joyner*, 539 F.2d 1162, 1164 (8th Cir.), cert. denied, 429 U.S. 983 (1976) (misstatement in indictment was not reversible error; conspiracy starting date of September 18, 1975, should have read September 18, 1973); *United States* v. *Reece*, 547 F.2d 432, 434-435 (8th Cir. 1977) (variance resulting from typographical error in date was harmless and did not affect the substantial rights of the defendant).

The court of appeals was clearly correct in concluding that in the circumstances of this case correction of the date did not result in prejudice to petitioner. The indictment alleged on its face that some overt acts occurred in 1975, 1976, and early 1977 and thus placed petitioner on notice of the time frame of the alleged conspiracy. The government's "open file" policy allowed petitioner to learn the scope of the evidence against him. Finally, as the court of appeals noted, petitioner waited several months before raising the obvious discrepancy in dates in Count 1. Pet. App. A10-A11. Compare *United States* v. *Powell*, 564 F.2d at 259; *United States* v. *Joyner*, 539 F.2d at 1164.

3. Petitioner urges (Pet. 20-22) that review by this Court is necessary because the courts of appeals are confused concerning the proper analysis of changes to indictments. He contends that some courts have inquired whether there

has been a per se violation of the right to indictment by a grand jury, while others (including the court below) ignore that right. But in all of the cases petitioner cites the courts have considered whether there has been a violation of the right to indictment by a grand jury.[2] The court of appeals here carefully analyzed the correction at issue and concluded that petitioner's constitutional right was not violated, since the change did not alter the basic theory of the offense as charged by the grand jury. See Pet. App. A8-A10. Thus, the conflict petitioner describes does not exist, and review by this Court is unwarranted.[3]

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[2]Petitioner cites *Jervis* v. *Hall, supra*, and *Krana* v. *United States, supra*, as cases in which courts have ignored the defendant's right to be indicted by a grand jury. But the conclusions of the courts in those cases that amendments of dates amounted to correction of clerical errors were essentially judgments that the changes were not ones of substance and thus did not abrogate any constitutional right.

Petitioner cites several cases for the proposition that amendment of an indictment amounts to a per se constitutional violation. Pet. 21-22. However, none of the cases cited suggests that correction of a clearly erroneous date would constitute such a violation. See *United States* v. *Gammill*, 421 F.2d 185 (10th Cir. 1970) (distinguishing between insertion of a date in an indictment that did not include any date for the alleged crime and correction of a date that is within the limitations period). As the court of appeals explained (Pet. App. A7-A8), the other cases petitioner cites differ only in terminology from those that analyze materiality and prejudice in connection with both amendments and variances. "[T]he term 'amendment' as used in those cases invokes a conceptual category rather than a literal description: an 'amendment' occurs when the basic 'charging terms' of the indictment are altered either literally or in effect." *Id.* at A7.

[3]As the court of appeals explained (Pet. App. A6-A7), the inflexible rule against amendment of an indictment, set forth in *Ex parte Bain*, 121 U.S. 1 (1887), has been moderated. Indeed, as this Court recently stated, *Ex parte Bain* has been confined to its facts. *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 1-3 n.2. Under more recent cases, courts apply tests of materiality and prejudice to both variances and amendments. See *Russell* v. *United States*, 369

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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U.S. at 763, 770; *Kotteakos* v. *United States*, 328 U.S. 750, 756-758, 764-765 (1946); *Berger* v. *United States*, 295 U.S. 78, 81-84 (1935). That approach makes eminent sense. As the court of appeals noted (Pet. App. A8), "if we were to depart from our previous refusal to scrutinize actual amendments more strictly than variances, we would simply discourage the government from forthrightly admitting to formal mistakes at the start of trial and encourage it instead to simply wait until later in the trial to offer proof inconsistent with the indictment's facial allegations, even though the latter course of conduct obviously contains a greater potential for prejudice to the defendant."

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